Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Petition for Relief From Unjust and | ) | |
| Unreasonable Discrimination in the | ) | |
| Deployment of Video Dialtone Facilities | ) | RM 8491 |
| | ) | |
| Petition for Rulemaking to Adapt the | ) | |
| Section 214 Process to the Construction | ) | |
| of Video Dialtone Facilities | ) | |

To: The Commission

## COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS

The Association of America's Public Television Stations ("APTS") submits its comments in response to the Commission's Public Notice, DA 94-621, released June 13, 1994, requesting public comment on the Petition for Rulemaking and Petition for Relief filed by the Center for Media Education, Consumer Federation of America, the Office of Communication of the United Church of Christ, the National Association for the Advancement of Colored People, and the National Council of LaRaza ("Petitioners"), in the above-captioned matter. The Petitioners request initiation of a rulemaking proceeding, as well as the concurrent issuance of a policy statement, interpretive rule, and procedural rule, to clarify and revise the Section 214 application process to allow a closer and more comprehensive analysis and resolution of issues that have arisen in the context of Section 214 applications to construct video dialtone facilities.

APTS is a private, nonprofit membership organization whose members include virtually all of the nation's public television stations. APTS represents its member stations before the Federal Communications Commission, Congress and the Executive Branch.

APTS concurs in the Petitioners' overall assessment that the Commission's reliance on the Section 214 application process as the means for deciding unresolved video dialtone issues will not insure that broad public policy issues are adequately addressed. Piecemeal approval of video dialtone applications threatens to undermine the development of a uniform, comprehensive video dialtone policy that serves the public interest.

The Commission is now granting individual Section 214 applications without considering and ruling upon an important policy issue raised by APTS and the Corporation for Public Broadcasting (CPB) in their Joint Petition for Reconsideration filed in the Commission's video dialtone proceeding, In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, CC Docket No. 87-266 (attached hereto). In that petition, APTS and CPB urge the Commission majority to reconsider its decision not to require local telephone companies to provide video dialtone capacity for the carriage of public telecommunications services at no charge or reduced rates. As Petitioners in this proceeding point out, video dialtone service "may ultimately supplant existing broadcast, cable, and telephone service" (Petition for Rulemaking, pp. 4-5). This highlights the importance of structuring the video dialtone service, from the inception, with sufficient safeguards to insure a place on this new system for noncommercial educational services.

As discussed in detail in the APTS/CPB petition, the Commission's initial decision is at odds with long-standing Congressional and Commission

policy guaranteeing the American public access to public telecommunications services. The Commission has already approved the first permanent deployment of video dialtone in Dover Township, New Jersey without any public access requirement. We believe it imperative that the Commission resolve this fundamental public interest policy issue before it approves any further Section 214 applications. [1]

Accordingly, APTS urges the Commission to suspend its consideration of Section 214 applications until it decides this critical public policy issue. Continued resolution of video dialtone issues on a case-by-case, piecemeal basis through application processing will only serve to thwart the public interest.

---

[1] Senator Inouye (D-Hawaii) has introduced S. 2195, "The National Public Telecommunications Infrastructure Act of 1994," which would establish no cost access for noncommercial educational services on telecommunications networks, including video dialtone systems. The introduction of this bill in no way alleviates the need for the Commission to act on the pending Petition for Reconsideration. The fate of S. 2195, as well as other pieces of telecommunications legislation (e.g., H.R. 3636 and S. 1822), is far from certain this session of Congress. In the meantime, video dialtone is being deployed without assurances of access to public telecommunications services for the American public. Moreover, as discussed in the pending petition, establishing a policy to facilitate the distribution of public services via video dialtone is well within the Commission's authority. The fact that there is a legislative effort to provide access across all technologies underscores the need for and validity of such a Commission policy in its newly authorized video dialtone service.

Respectfully submitted,

ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS

Marilyn Mohrman-Gillis
General Counsel
Lonna M. Thompson
1350 Connecticut Avenue, NW
Suite 200
Washington, D.C. 20036
(202) 887-8400

July 12, 1994

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



| | | |
|---|---|---|
| In the Matter of | ) | |
| TELEPHONE COMPANY-CABLE | ) | |
| TELEVISION | ) | CC Docket No. 87-266 |
| Cross-Ownership Rules, | ) | |
| Sections 63.54 - 63.58 | ) | |

TO: The Commission

**JOINT PETITION FOR RECONSIDERATION**
**OF**
**THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS**
**AND**
**CORPORATION FOR PUBLIC BROADCASTING**

---

Paul E. Symczak
Senior Vice President,
General Counsel and Secretary
Pamela J. Brown
Senior Staff Attorney
OF COUNSEL:
Edward Coltman, Director
Andrew Russell, Deputy Director
Policy Development and Planning
CORPORATION FOR PUBLIC BROADCASTING
901 E Street, N.W.
Washington, D.C. 20004-2006
202-879-9600

David J. Brugger
President
Marilyn Mohrman-Gillis
General Counsel
THE ASSOCIATION OF AMERICA'S
PUBLIC TELEVISION STATIONS
1350 Connecticut Ave., N.W.
Washington, D.C. 20006
202-887-1700

Henry M. Rivera
Larry S. Solomon
GINSBURG, FELDMAN & BRESS CHARTERED
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 637-9012
Their Attorneys

Dated: October 9, 1992

## TABLE OF CONTENTS

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| TELEPHONE COMPANY-CABLE | ) | |
| TELEVISION | ) | CC Docket No. 87-266 |
| Cross-Ownership Rules, | ) | |
| Sections 63.54 - 63.58 | ) | |

TO: The Commission

**JOINT PETITION FOR RECONSIDERATION**
**OF**
**THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS**
**AND**
**CORPORATION FOR PUBLIC BROADCASTING**


**SUMMARY**

The Association of America's Public Television Stations ("APTS") and the Corporation For Public Broadcasting ("CPB") seek reconsideration of that portion of the Commission's decision in the "Video Dialtone" proceeding which declined to adopt rules requiring local telephone companies to provide video dialtone services for the carriage of public telecommunications service at no charge or at reduced rates. Unless this portion of the Commission's decision is reconsidered, and public telecommunications services are able to utilize video dialtone facilities at no charge, or at reduced rates, the public will likely be denied access to public telecommunications services through a medium that may well become the sole source for video programming.

Specifically, the Commission's decision must be reconsidered because: (1) the action is contrary to the Congressional mandate enunciated in two laws, enacted after the Commission's decision in this proceeding, The Public Telecommunications Act of 1992 and The Cable Television Consumer Protection and Competition Act of 1992; (2) the majority decision abandoned long-standing Congressional and Commission policy guaranteeing the American public access to public telecommunications services; and, (3) because the Commission failed to provide a reasoned explanation, based upon a consideration of relevant factors in the record, for its abrupt departure from firmly established Congressional and Commission policy, the decision is arbitrary and capricious and will not withstand judicial scrutiny.

The Commission's decision in this proceeding is inconsistent with Congress' determination that there is a compelling government interest in making public telecommunications services available to all of the citizens of the United States over all telecommunications distribution technologies.

The Commission's notion of marketplace regulation for video dialtone is inconsistent with Congressionally-mandated access for public telecommunications. Both Congress and the Commission have recognized that the purpose of public telecommunications is to provide the American public with the very type of programming that the marketplace will not and cannot support. There is no logical basis, therefore, for the Commission's conclusion that the marketplace will somehow support and facilitate the distribution of public service programming on a video dialtone

system without the accommodations accorded in other transmission media.

The Commission's nondiscrimination argument that favoring public telecommunications services over other voices will interfere with equality of access is flawed. Congress has established that public telecommunications should be afforded special accommodations. The common carrier nature of video dialtone will ensure that such accommodations will not interfere with access for other entities. However, public telecommunications providers cannot provide public telecommunications services to the American public via video dialtone without significant subsidy of the charges for video dialtone services. Therefore, the Commission's nondiscriminatory access objective is, in fact, frustrated by its decision in this proceeding.

Finally, aside from failing to provide a reasoned analysis, based upon the record, for the departure from existing policy, the Commission does not state that there is any legal impediment to providing video dialtone for public telecommunications free of charge or at reduced rates. Accordingly, the Commission has chosen to adopt a policy that is inconsistent with and violative of Federal statute and existing Congressional and Commission policy. Therefore, this decision must be reconsidered.

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of<br>TELEPHONE COMPANY-CABLE<br>TELEVISION<br>Cross-Ownership Rules,<br>Sections 63.54 - 63.58 | )<br>)<br>)<br>)<br>) | CC Docket No. 87-266 |

TO: The Commission

**JOINT PETITION FOR RECONSIDERATION**
**OF**
**THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS**
**AND**
**CORPORATION FOR PUBLIC BROADCASTING**

## I. INTRODUCTION

The Association of America's Public Television Stations, Inc. ("APTS") and the Corporation for Public Broadcasting ("CPB"), by their attorneys, pursuant to §1.429 of the Commission's rules, hereby submit this Joint Petition for Reconsideration of the Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rule Making in the above-captioned proceeding ("Report and Order").[1/]

1. Both APTS and CPB are very interested in and have actively participated in this proceeding[2/] in order to attempt to ensure meaningful access to public telecommunications services by all citizens of the United States. In this Petition, APTS and

---

1/ Released August 14, 1992; 57 Fed. Reg. 41106 (Sept. 9, 1992).

2/ Comments were filed on February 3, 1992.

CPB, urge the Commission to reconsider that portion of its decision, set forth at paragraph 44 of the Report and Order, wherein a majority of the Commission refused to adopt rules requiring local telephone exchange carriers ("LECs" or "local telephone companies") to provide video dialtone service for the carriage of public telecommunication service at no charge or at reduced rates.[3/] For the reasons set forth below, in failing to adopt such rules, the Commission's majority decision violates Congressional mandates and existing Commission policy, and will likely deny the American public meaningful access to public service programming delivered by means of video dialtone service -- a medium that may be the sole service for video programming in the future.

2. The Commission's decision will likely deny access to public telecommunications programming in two important respects. First, without free or reduced rate access for public telecommunications entities to distribute their programming, these entities may be unable to provide video programming services utilizing video dialtone facilities. Second, if the recipient of the programming must pay for receiving the programming, then access could be barred or limited because of the recipient's inability to pay for the service.

---

3/ "Public telecommunications service" means "noncommercial educational radio and television programs, and related noncommercial instructional or informational material that can be transmitted by electronic communications." 47 U.S.C. §397(14).

3. Accordingly, the public interest requires reconsideration of the majority's action because: (i) the action is contrary to new facts, in the form of two new statutes enacted after adoption of the Report and Order: The Public Telecommunications Act of 1992, which unequivocally states the Congressional intent that all citizens of the United States must have access to public telecommunications services through all available telecommunications distribution technologies;[4/] and the Cable Television Consumer Protection and Competition Act of 1992, which requires access for public service programming on cable systems and a reservation of direct broadcast satellite channel capacity for noncommercial, educational programming at preferential rates;[5/] (ii) the Commission majority committed reversible error by its unexplained departure from long-standing Congressional and Commission policy guaranteeing the American public access to public telecommunications services; and, (iii) the Commission has the legal authority to grant the relief requested but has, for no discernable reason, arbitrarily and capriciously chosen to adopt a policy contrary to that mandated by Congress and contrary to that established by the Commission.

4. Thus, in order to comply with Congressional mandates and Commission policy ensuring access to public telecommunications services, the Report and Order must be

---

[4/] Pub. L. No. 102-356, 106 Stat. 949 (Aug. 26, 1992).

[5/] Pub. L. No. 102-385, 106 Stat. 1460 (Oct. 5, 1992) (the "Cable Act").

reconsidered and rules must be adopted which require LECs to provide video dialtone service for public telecommunications services at no charge or at reduced rates.

## II. THE COMMISSION'S ACTION VIOLATES BEDROCK FEDERAL STATUTES AND COMMISSION POLICY

### A. Congress Has Determined That Access To Public Telecommunications Programming Serves A Compelling Government Interest

#### 1. The Public Telecommunications Act of 1992

5. It is well-founded Congressional policy that the public interest requires that public telecommunications services be accessible by as many citizens as possible, regardless of the technology or systems employed, and regardless of whether those services, in the past, have been primarily distributed by broadcast technology. The Public Telecommunications Act of 1992, signed into law by President Bush on August 26, 1992, adds a new paragraph -- §396(a)(9) -- to the Communications Act of 1934. §396(a)(9) states:

> it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies . . . .[6/]

6. The legislative history of this statute is also very clear. The House Committee Report states Congress' finding that access to public telecommunications services, through all

---

6/ Pub. L. No. 102-356, 106 Stat. 949 (Aug. 26, 1992).

available distribution technologies, is intended to advance the compelling governmental interest in increasing the amount of educational, informational, and public interest programming available to the public:

> The Committee recognizes the tremendous expansion of telecommunications delivery systems made possible by technological advances. The Committee believes that the full potential of telecommunications as a means to address educational issues can be realized only if the public is provided access to public service programming through all distribution technologies -- not just broadcast -- that are available to them. To achieve this potential, the sound public policy of reserving broadcast channels for public television and radio should be extended to reserve capacity for public service programming on new distribution technologies.
>
> The Committee believes that it is in the public interest to ensure that all citizens have access to public telecommunications services. The Committee strongly endorses a policy of broad access to the essential public services offered by public telecommunications, regardless of the technology used to deliver those services, in order to advance the compelling governmental interest in increasing the amount of educational, informational, and public interest programming available to the nation's citizens.[1/]

---

[1/] H.R. Rep. No. 363, 102d Cong., 1st Sess. 18 (1991) [emphasis added]. The Senate Report on this legislation contains similar language, see, e.g., S. Rep. No. 221, 102d Cong., 1st Sess. 7 (1991).

**2. The Public Broadcasting Act of 1967 and Its Progeny**

7. Congress has long advocated a strong federal policy of access to public telecommunications services. In the 1967 Act, Congress found that:

> it is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications services available to all citizens of the United States.[8/]

8. Congress' emphasis on the nonbroadcast delivery of public telecommunications services is not new. From the inception of public broadcasting, Congress has recognized the importance of utilizing nonbroadcasting distribution mechanisms for the delivery of public service programming: "it is in the public interest to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services." 47 U.S.C. §396(a)(2). Congress has continued to support access to public service programming through emerging nonbroadcast delivery technologies. The Definitions Section of the 1967 Act makes provision for the dissemination of noncommercial, educational programming over both

---

[8/] 47 U.S.C. §396(a)(7). Congress has repeatedly reaffirmed its support for access to public service programming in its annual appropriations deliberations and every three years in its reauthorization of funding. Since 1967, Congress has appropriated approximately $3.89 billion (through FY 1995) to fund public service programming through CPB, and approximately $597 million (through FY 1992) for the planning and construction of public television and radio facilities, including the public broadcasting satellite distribution system.

broadcast and other than broadcast facilities. See 47 U.S.C. §§397(6) and (7).

In 1978, Congress adopted the Telecommunications Financing Act to assist in the funding of public telecommunications facilities, to "extend delivery of public telecommunications services to as many citizens of the United States as possible by the most efficient and economical means, including the use of broadcast and nonbroadcast technologies."[9/] The Senate Report to the 1978 Act specifically anticipated "the breakthroughs that are likely in optical fiber," among other technologies, and noted that "[i]t is in the public interest for public broadcasting to make the maximum use practicable of these new technologies."[10/]

### 3. The Cable Television Consumer Protection and Competition Act of 1992 and Other Statutes

9. Since the Commission's video dialtone decision, Congress has also adopted policies facilitating access for public service programming in two additional distribution technologies: cable and direct broadcast satellite ("DBS"). In the Cable Act, which became law on October 5, 1992, Congress has required cable systems to carry public television stations. In so doing, Congress recognized:

> a substantial governmental and First Amendment interest in ensuring that cable

---

9/ (47 U.S.C. §390) (Emphasis added).

10/ Senate Committee on Commerce, Public Telecommunications Financing Act of 1978, S. Rep. No. 95-858, 95th Cong. 2d Sess. 6.

> subscribers have access to local noncommercial educational stations which Congress has authorized, as expressed [in the Communications Act of 1934.][11]

Congress specifically recognized that its "must carry" provision was part of its broader policy of facilitating the delivery of public telecommunications services:

> The government has a compelling interest in ensuring that [public telecommunications services] remain fully accessible to the widest possible audience <u>without regard for the technology used to deliver these educational and informational services</u>.[12]

Congress recognized that laws guaranteeing access to cable systems are necessary in part because "public television has provided precisely the type of programming commercial broadcasters and cable operators find economically unattractive."[13] The marketplace will not support carriage of such programming:

> absent carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.[14]

10. In the same cable legislation, Congress provided for the reservation of capacity, and for preferential rates, for the

---

[11] The Cable Act, § 2(a)(7).

[12] H.R. Rep. 682, 101st Cong., 2d Sess. 47 (1991) [emphasis added].

[13] Id. at 48.

[14] Id. at §2(a)(8)(D).

distribution of public service programming on the newly emerging direct broadcast satellite service.[15/] The law provides that a DBS service provider must reserve between 4 and 7 percent of its channel capacity "exclusively for noncommercial programming of an educational or informational nature."[16/] The provider shall make capacity available "upon reasonable prices, terms, and conditions, as determined by the Commission . . . ." In determining reasonable prices, "the Commission shall take into account the nonprofit character of the programming provider and any Federal funds used to support such programming"; and shall not permit prices in excess of 50% of the total direct costs of making the channel available.[17/]

11. This reservation of capacity on the emerging DBS technology, and provision of preferential rates for utilization of that capacity, provide direct precedent and support for APTS' and CPB's request for special rate policies in video dialtone. The must carry and DBS provisions constitute the most recent strong and unequivocal restatements of Congress' fundamental public telecommunications access policy.

---

[15/] Congress had previously expressed its intent that the public have access to satellite delivered public service programming by requiring that at least one channel of Public Broadcasting's satellite-distributed National Program Service must remain unencrypted. This provides home satellite dish owners access to public broadcasting without having to be concerned about how much such access will cost. 47 U.S.C. §605(C).

[16/] Cable Act, §335(b)(1).

[17/] Id. at §335(b)(4).

12. Significantly, Congress has also manifested concern that access by the American public to public television must be ensured in the common carrier context, Section 396(h)(1) of the Communications Act, states: "Nothing in this Act, or in any other provision of law, shall be construed to prevent United States common carriers from rendering free or reduced rate communications interconnection services for public television . . . ."[18/]

**B. Access to Public Telecommunications Services Has Also Been A Steadfast Commission Policy**

13. Until the issuance of the subject Report and Order, Commission policies have always resonated with the Congressional mandates discussed above. Beginning in 1952, the Commission, recognizing the unique and important services that such television programming could offer, reserved 242 channels on the Ultra High Frequency ("UHF") spectrum (Channels 14-83) for educational television.[19/] Since then, the Commission has defended these reservations against efforts by commercial broadcasters to de-reserve them;[20/] and it has reserved

---

[18/] 47 U.S.C. §396(h)(1).

[19/] Television Assignments, Sixth Report and Order, 41 F.C.C. 148 (1952).

[20/] See, e.g., Television Assignments in New Smyrna Beach, Florida 50 R.R.2d 1714 (1982); Television Assignments in Houston, Texas, 50 R.R.2d 1420 (1982); Table of Assignments in Ogden, Utah, 26 F.C.C.2d 142 (1970), recon. denied, 28 F.C.C.2d 705 (1971); Channel Assignments in Hamilton, Alabama, 21 R.R. 1577 (1961); Channel Assignments in Longview-Denton, Texas, 17 R.R. 1549 (1958); recon. denied, 17 R.R. 1552a (1959); Channel

(continued...)

additional channels to further the reach of public television service,[21] to provide better picture quality,[22] to permit the formation of networks of noncommercial educational stations.[23] Most recently, the Commission has committed to carry over its channel reservation policy in its allotment of high definition television (HDTV) channels to broadcasters. It has committed to reserve noncommercial educational HDTV channels for existing public broadcasters and to preserve vacant noncommercial allotments in its allotment plan.[24] In so doing, the

---

[20] (...continued)
Assignments to Des Moines, Iowa, 14 R.R. 152d (1956), recon. denied, 14 R.R. 1528 (1956).

[21] See, Television Channel Assignment at Anchorage, Alaska, 68 R.R.2d 1121 (1990); Television Channel Assignment at Victoria, TX, 52 R.R.2d 1508 (1983); Television Channel Assignment at Seaford, Del., 43 R.R.2d 1551 (1978); Television Channel Assignment at Mount View, Ark., 38 R.R.2d 1298 (1976); Television Channel Assignment at Eufaula, Okla., 35 R.R.2d 1039 (1975); Television Channel assignment at Booneville, Miss., 27 R.R.2d 246 (1973); Television Channel Assignment at Parson, Kansas, 23 R.R.2d 1707 (1972); Television Channel Assignment in the Virgin Islands, 20 R.R.2d 1659 (1970) (Mileage separation requirements with co-channels in Puerto Rico waived; the most important factor for waiver is that the channels were for educational use); Television Channel Assignments at Las Cruces, New Mexico, 14 R.R.2d 1518 (1967) (18 UHF channels assigned to Hawaii, with 9 reserved for noncommercial educational use); Television Channel Assignment at Eagle Bute, S.D., 10 R.R.2d 1767; Television Channel Assignment in Staunton, VA, 5 F.C.C.2d 537 (1966).

[22] Television Channel Assignments at Nashville, Tenn. 26 R.R.2d 1667 (1973).

[23] Television Channel Assignments at McGill, Nevada and Richfield, Utah, 24 R.R.2d 1855 (1972).

[24] Second Report and Order/Further Notice of Proposed Rulemaking in MM Docket No. 97-268 (released May 8, 1992); Third (continued...)

Commission recognized "the important role noncommercial educational stations play in providing quality programming to the public and the financial constraints they face in building and running their stations."[25/]

The Commission also recognized the need for cable carriage rules to ensure access to public television programming. In its 1990 Cable Report to Congress, the Commission stated:

> Because of the unique service provided by noncommercial television stations, and because of the expressed governmental interest in their viability, we believe that all Americans should have access to them. We believe that mandatory carriage of noncommercial television stations would further this important goal.

Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Services, 5 FCC Rcd. 4962, 5044 (1990).

**C. The Commission's Failure to Provide for Video Dialtone Carriage at Free or Reduced Rates Constitutes a Denial of Access to Public Service Programming**

14. The Commission's failure to provide for video dialtone carriage of public telecommunications services at no charge or at reduced rates directly undermines the clear Congressional and Commission policy of assuring that the American public has access to such services regardless of the distribution technology.

---

[24/](...continued)
Report and Order/Further Notice of Proposed Rulemaking in MM Docket No. 97-268 (adopted Sept. 17, 1992).

[25/] Second Report at ¶ 36. In its latest Notice, the Commission, recognizing the unique funding constraints on public broadcasters, asked whether they need additional time to file and construct HDTV facilities. See, FCC News Release, Sept. 17, 1992.

15. The majority suggests, in Paragraph 44 of the Report and Order, that the marketplace should govern access to video dialtone. The majority postures that "the bedrock common carrier nature of video dialtone . . . will require unfettered access for all program providers, regardless of their nature . . . ."

16. The majority's analysis is faulty. Both Congress and the Commission have repeatedly recognized that the marketplace will not support the production or distribution of public service programming. In the House Report to the 1967 Public Broadcasting Act, Congress recognized: "[T]he economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal."[26/]

17. In recent years, Congress has repeatedly acknowledged the need for a public television system that operates independently of the marketplace.[27/] In passing the Public Broadcasting Amendments Act of 1981, Congress recognized that public television delivers "the very best in television programming, . . . that which is unavailable anywhere else, and develops programs that meet the needs of underserved and diverse

---

[26/] H.Rep. No. 572, 90th Cong., 1st Sess. 1, reprinted in 1967 U.S. Code Cong. & Admin. News 1799.

[27/] H.R. Rep. No. 82, 97th Cong., 1st Sess. 21, 7 (1981). Accord S. Rep. No. 63, 99th Cong., 1st Sess. 21 (1985) (one of the "truly fundamental" principles of public television is that it "operates outside of the regular marketplace").

audiences throughout the country."[28/] In 1988, Congress reaffirmed that public television's "original mandate" is to serve as "an educational, innovative and experimental alternative to commercial broadcasting."[29/]

18. Public broadcasting was created to ensure the American public has access to types of programming that the marketplace would not and could not support. This premise is the core of Commission and Congressional initiatives supporting public telecommunications policies. Congress and/or the Commission have already recognized that the marketplace will not support the distribution of public service programming via broadcast, cable, and direct broadcast satellite without some type of preferential regulatory policies. There is no logical basis or evidence for the Commission's conclusion that the marketplace will somehow support and facilitate the distribution of public service video programming on a video dialtone system without similar policies.

19. Commissioner Duggan, in a separate dissenting statement, pointed to Congress and the Commission's "strong public interest in preserving free access to publicly funded television," and asked some critical questions: Can public broadcasters afford to pay for carriage on a video dialtone system; and will public broadcasters be forced to charge

---

28/ H.R. Rep. No. 82, 97th Cong., 1st Sess, 21, 7 (1981).

29/ H.R. Rep. No. 825, 100th Cong., 2d Sess. 10 (1988) [emphasis added].

subscribers for previously free public television programming?[30/]

20. Public telecommunications service providers cannot pay the same rates as other users of video dialtone services and still provide noncommercial educational service to the public. If public telecommunications service providers are required to pay marketplace rates to access video dialtone, they will be faced with two (undesirable) alternatives: 1) they may forego any use of video dialtone for distribution of public service programming to the public, instead relying on other distribution systems; or 2) they may choose to deliver only those services that are able to generate sufficient revenues. Both alternative would limit access to public service programming and impede public television from fulfilling its current Congressional mandate -- to provide quality educational programming to all Americans, to serve the culturally diverse, unserved and underserved pockets of the American public, and to develop the public service potential of all appropriate and available technologies. Moreover, they would limit the full development of the video dialtone infrastructure and its ability to provide benefit to the nation.[31/]

---

[30/] Report and Order, Separate Statement of Commissioner Ervin S. Duggan at 3-4.

[31/] The Commission's suggestion at footnote 103 that Congress or state legislatures could provide monies directly through targeted appropriations if the marketplace does not

(continued...)

21. If fiber becomes, as some predict, the preferred or exclusive method for the distribution of video telecommunications in the United States, the Commission's denial of meaningful video dialtone access for public service programming will have even more serious consequences. Those who cannot pay subscriber fees will be completely deprived of public telecommunications services, which they fund through their tax dollars.

22. In sum, the Commission's decision to permit public service providers access to video dialtone only on strict

---

31/(...continued)
provide for access for public service programming is not adequate. First, the availability of appropriations for public television has not eliminated the need for regulatory policies to facilitate the distribution of public service programming via broadcast signals, coaxial cable or direct satellite services. In each of these cases, Congress or the Commission recognized the need to establish regulatory policies to facilitate access to the public service programming they have funded. It would be poor use of government funds if public service programming were created with government funds but the public were denied access to that programming because of distribution cost considerations.

Moreover, such targeted funding is unpredictable. It is subject to political and economic influences operative in the federal or state governments on a year-to-year basis. Whether Congress or state legislatures can afford to appropriate funds for public service programming in any given year should not be the factor driving a sound national public telecommunications policy. Furthermore, a primary consideration of federal and state governments in funding for public telecommunications services is its availability to the broadest segments of the public. If access were limited due to cost considerations (as a result of the instant ruling), interest and support of federal and state governments for public service programming would likely be diminished.

Finally, Congress clearly envisioned means other than direct appropriations to facilitate the distribution of public telecommunications services. Congress directed that "the sound public policy of reserving broadcast channels for public television and radio should be extended to . . . new distribution technologies." H.R. Rep. No. 363, 102d Cong., 1st Sess 18 (1991).